No. 80-83

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In the Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND S. MUSKIE, SECRETARY OF STATE,
PETITIONER

v.

PHILIP AGEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent primarily contends (Resp. Br. 7, 15-18, 27-34, 62, 78-79, 91) that the decisions in *Kent* v. *Dulles*, 357 U.S. 116 (1958), and *Dayton* v. *Dulles*, 357 U.S. 144 (1958), are controlling here. Those cases are readily distinguishable, however. In both *Kent* and *Dayton*, the Secretary of State refused to issue passports to several citizens because they were communists. In denying the applicants' request, the Secretary relied solely on 22 C.F.R. 51.135 (1957), which provided that "no passport * * * shall

be issued to * * * [p]ersons who are members of the Communist Party or * * * who engage in activities which support the Communist movement[, or who] are going abroad to engage in activities which will advance the Communist movement * * *." See *Kent* v. *Dulles*, *supra*, 357 U.S. at 117-118 n.1. The Secretary did not cite or rely on 22 C.F.R. 51.136 (1957), a predecessor version of the regulation at issue in this case, which stated that a "passport * * * will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) *be prejudicial to the orderly conduct of foreign relations*; or (c) *otherwise be prejudicial to the interests of the United States*." 21 Fed. Reg. 336 (1956) (emphasis supplied).

Thus, "the issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations" (*Zemel* v. *Rusk*, 381 U.S. 1, 13 (1965)), and not whether the Secretary has authority to revoke a passport on foreign policy or national security grounds. As the Court explained in *Kent* (357 U.S. at 130; emphasis supplied):

> We deal with beliefs, with associations, with ideological matters. We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement *solely* because of their refusal to be subjected to inquiry into their beliefs and associations.[1]

Likewise, the Court has subsequently emphasized that the *Kent* decision held only "that Congress had not

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[1] *Dayton* simply concluded that the passport in that case had been denied "for reasons which we have today held [in *Kent*] to be impermissible." 357 U.S. at 150.

conferred authority upon the Secretary of State to deny passports because of alleged Communist beliefs and associations." *Aptheker* v. *Secretary of State*, 378 U.S. 500, 506 (1964). See *Zemel* v. *Rusk*, *supra*, 381 U.S. at 13. Here, of course, the Secretary revoked respondent's passport not because of his beliefs or associations, but because, as he concedes, his travels are substantially harming the national security and foreign policy of the United States.

To be sure, the dissenting Justices in *Kent* suggested that the Secretary had acted in that case "to deny a passport to a Communist whose travel abroad would be inimical to our national security." 357 U.S. at 131 (Clark, J., dissenting). But that observation, as the decisions in both *Kent* and *Aptheker* make clear, was premised on the erroneous assumption that mere membership or association with the Communist Party, or belief in communist principles, is harmful to the nation's security and foreign policy. See 357 U.S. at 128. Indeed, in *Aptheker*, the Court considered the validity of a statute enacted "to protect our national security" by prohibiting the issuance of a passport to any member of a communist organization. See 378 U.S. at 509. Notwithstanding Congress' specific findings regarding the danger posed by the foreign travel of all communists, the Court held the statute unconstitutional on its face because "[t]he prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe." *Id.* at 514.

2. In our opening brief (Br. 20-47), we demonstrated at length that the Secretary's revocation of respondent's passport on national security and foreign policy grounds is consistent with 200 years of

administrative practice and Congress' evident intent. In an effort to discredit this unbroken and compelling historical record, respondent raises three erroneous contentions. First, respondent suggests (Resp. Br. 35-47) that the Secretary is required to establish a consistent administrative practice solely on the basis of actual passport revocations and denials and that he has failed to do so here. Second, respondent argues (Resp. Br. 47-58) that in any event the Executive has been inconsistent in its view of the Secretary's authority over the denial and revocation of passports. Finally, respondent contends (Resp. Br. 59-96) that the legislative history shows that Congress has sought to deny the Executive the precise power that it exercised in this case. We address these claims in turn.

a. Respondent erroneously states (Resp. Br. 46) that "*Kent* and *Zemel* are explicit that it is the actual exercise of power over passports by the Secretary, rather than the mere expression of the power, which determines useable administrative practices." At the outset, we note that our opening brief identifies more than 100 actual cases in which the Secretary has apparently revoked or denied a passport on national security or foreign policy grounds. See Pet. Br. 28-30, 39-40 and n.30. More examples undoubtedly exist among the passport records of the Department of State. In large part, however, the relatively discrete number of cases in which the Secretary has revoked or denied a passport on national security or foreign policy grounds is attributable to the Secretary's judicious exercise of his authority and the fact that few citizens have either the inclination or the ability to harm this country that respondent concededly has.[2]

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[2] Respondent's discussion of the individual cases is inaccurate. For example, respondent characterizes (Resp.

More important, respondent's major premise is patently flawed. In both *Kent* and *Zemel*, the Court considered State Department regulations and circulars, and other Executive pronouncements on passport policy, as well as actual passport denials, in determining whether the challenged passport control was consistent with prior practice. Thus, the authorities cited in *Kent* (357 U.S. at 127) quote several of the regulations, opinions, and general policy statements relied on by the Secretary in this case. See 3 J. Moore, *International Law Digest* § 512 (1906); 3 G. Hackworth, *Digest of International Law* § 268 (1942); C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* § 401 (2d rev. ed. 1945). Similarly, the administrative practice canvassed in *Zemel* consists primarily of general regulations, executive orders and the like, and not individual cases. See 381 U.S. at 8-12, 18. Indeed, because Congress is more likely to be aware of State Department policies and regulations rather than the denial or revocation of an individual passport, consideration of those policies and regulations is essential to a proper understanding of prior administrative practice.

Br. 41) the 1906 and 1907 passport denials discussed in our opening brief (Pet. Br. 29-30) as "both involv[ing] run-of-the-mill illegal conduct." The Secretary did not rely on the unlawful nature of the applicant's conduct, however, but on the effect of that conduct on our foreign relations. See Pet. Br. at 29-30. Furthermore, any illegal conduct that may have been involved in those cases concerned violation of foreign and not domestic law. Because the Secretary has authority to revoke or deny a passport on the ground of unlawful conduct only in cases involving the enforcement of the criminal laws of this country (see 22 C.F.R. 51.70(a)(1), (2), (4), and (5)), the revocations could not have been based on the allegedly illegal nature of the citizens' activities.

b. Respondent further claims (Br. 47-57) that the Executive has not consistently concluded that it may deny or revoke passports in order to protect the national security and foreign policy of this country. But respondent is unable to explain the unbroken line of executive orders, regulations, and passport office circulars discussed in our opening brief (Pet. Br. 26-28, 33-34, 36-38). Moreover, as we now demonstrate, respondent essentially relies on statements taken out of context or incompletely quoted.

Citing 13 Op. Att'y Gen. 397, 398 (1871), 15 Op. Att'y Gen. 114, 117 (1876), and 17 Op. Att'y Gen. 674 (1884), respondent claims (Resp. Br. 47, 61) that the Attorney General has repeatedly concluded that any citizen is entitled to a passport as a matter of right in peacetime. But none of these opinions focuses on the discretionary power of the Secretary to deny or revoke a passport, much less suggests that the Secretary is powerless to protect this country's foreign policy or national security in appropriate circumstances. Thus, the opinions of Attorneys General Akerman (13 Op. Att'y Gen. 397 (1871)) and Taft (15 Op. Att'y Gen. 114 (1876)) respectively explain that citizens of Texas at the time of annexation and naturalized citizens are to be treated like other "citizens of the United States, and are entitled to passports as such." 13 Op. Att'y Gen., *supra*, at 398.[3] Similarly, the opinion of Attorney General Brewster concerning the illegality of the issuance of certain

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[3] If the opinions relied on by respondent were intended to limit the Secretary's authority, it is inconceivable that they did not explain or repudiate the unequivocal and essentially contemporaneous opinion by Attorney General Hoar on the Secretary's broad discretionary power. See 13 Op. Att'y Gen. 89, 92 (1869).

identification documents by persons other than the Secretary of State is also clearly inapposite. See 17 Op. Att'y Gen. 674 (1884). In contrast, on the two occasions that the Attorney General has addressed the Secretary's authority regarding passports, he has unequivocally stated that "a passport * * * may, in [the Secretary's] discretion, be granted or withheld" in order to protect the public interest. See 23 Op. Att'y Gen. 509, 511 (1901); 13 Op. Att'y Gen. 89, 92 (1869).

Respondent also incorrectly suggests (Resp. Br. 47-50) that Secretaries of State have themselves on occasion stated that they must issue a passport to all citizens regardless of the danger to the nation's security and foreign policy. The two quotations cited by respondent are taken out of context. Thus, Secretary of State Fish's commentary that "any citizen of the United States has a right to be furnished with such evidence of citizenship" was made in the course of determining that a naturalized citizen is as entitled to a passport as any other citizen provided he "compl[ies] with the usual regulations." 2 Wharton, *International Law Digest* 465 (2d ed. 1887). Likewise, as the sentence following the material quoted by respondent (Resp. Br. 49-50) makes clear, Secretary of State Adee's letter of 1899 was intended only to reiterate that "[a]s a general rule it would hardly do to make moral character a basis for the issuance of passports." See 1899 *Foreign Relations of the United States* 187; 3 J. Moore, *International Law Digest* § 512, at 922-923 (1906). Secretary Adee did not purport to delineate the bases on which a passport could be denied, except to note that "refusal of a passport can be predicated on authority of law or on diplomatic instructions and regulations

made pursuant to law." 1899 *Foreign Relations of the United States* 187.[4]

c. Respondent's assertion (Resp. Br. 60) that the history of passport legislation shows "that Congress has steadily refused to provide or approve the authority here invoked" is remarkable. The discussion in our opening brief demonstrates beyond question (Pet. Br. 22-47) that the Passport Act of 1926 codified the Executive's broad discretionary powers over the issuance of passports, and that Congress, in considering and enacting various travel control legislation, has repeatedly and unequivocally evidenced its view that the Secretary may deny or revoke a passport in order to protect the national interest. Below, we respond briefly to the major errors and omissions in respondent's discussion of this history.

First, respondent erroneously suggests (Resp. Br. 65-66, 73) that the legislative history accompanying the Passport Acts of 1856 and 1926 shows that Congress viewed those provisions *solely* as a convenience for American travelers. None of the three isolated statements cited by respondent supports this sweeping contention, however.[5] Moreover, respondent's

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[4] Respondent's reliance (Resp. Br. 51) on a 1932 State Department letter is also misplaced. That letter was sent in response to a suggestion by a district attorney that passports be denied to persons who were leaving this country in order to abandon their families. The Department official was not addressing the foreign policy and national security considerations presented in this case. See 3 G. Hackworth, *supra*, at 500.

[5] For example, respondent misleadingly states (Resp. Br. 65) that "Senator Seward described the *bill* as a 'convenience to Americans abroad.'" Cong. Globe, 34th Cong., 1st Sess. 1797 (1856) (emphasis supplied). In fact, Senator Seward stated only that the provision of the Act authorizing American consuls abroad to issue passports was a convenience. See *ibid.*

characterization of the congressional purpose informing the Passport Act simply ignores the legislative reports, debates, and hearings that reflect Congress' understanding that the Secretary had previously exercised broad discretionary power over the issuance and denial of passports and that Congress had intended to codify that power. See Pet. Br. 25-26, 34-35.

Furthermore, respondent's discussion of the travel control statutes of 1918 and 1941 confuses the concepts of passport control, which involves the Secretary's authority to issue or deny passports, and travel control, which concerns Congress' decision to prohibit ingress and egress by citizens without a passport. As we explained in our opening brief (Pet. Br. 30-34, 40-42, 46-47), in 1918, 1941, 1952, and 1978, Congress enacted travel control legislation the effectiveness of which was wholly dependent on the Secretary's existing authority to revoke and deny passports to protect the national interest. In addition, the legislative history of each of those statutes evinces Congress' intent that the Secretary could and should refuse a passport to a citizen whose travels abroad are likely to harm the foreign policy and national security of the United States. It is irrelevant that, as respondent points out (Resp. Br. 67-72, 75-76), Congress also recognized that the Secretary perhaps lacked authority to impose *travel* control restrictions on the nation and that it declined (until 1978) to require such restrictions in non-emergency peacetime.[6] The issue in this case is whether the

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[6] In 1978, Congress established that unless otherwise provided by the Executive, a citizen must have a passport while entering or leaving the country. See Pub. L. No. 95-426,

Passport Act authorizes the Secretary to revoke respondent's passport because his foreign travels are concededly harming the national security and foreign policy of the United States, and not whether the Act authorizes the Secretary to compel respondent to have a passport as a condition for entering or leaving the country.[7]

Respondent's discussion of the post-*Kent* legislalative history is equally wide of the mark. He contends (Resp. Br. 52-57, 80-86) that following the decision in *Kent*, the Executive acknowledged that it lacked authority to deny a passport on national security grounds, and that it unsuccessfully sought congressional authorization on this point. In fact, however, the history shows that both the Executive and Congress were then focusing almost exclusively on the Executive's authority to limit the international travels of communists and not the separate issue presented by this case. See Pet. Br. 44-45. Furthermore, we again note that respondent's authorities do not support his claims.

Notwithstanding respondent's contrary assertions (Resp. Br. 52-57, 80), neither President Eisenhower

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Section 707(b), 92 Stat. 993, codified at 8 U.S.C. (Supp. II) 1185(b). The Senate Report issued with the 1978 Act states unequivocally that "the passport authority should not be restricted in any way which would limit the President's ability to control the departure of U.S. citizens to foreign countries when such travel is inconsistent with a greater government interest * * *." S. Rep. No. 95-842, 95th Cong., 2d Sess. 14 (1978).

[7] We further note that respondent mischaracterizes the 1920 debates as focusing on "[n]ational security considerations" (Resp. Br. 72 n.29). Again, respondent's citations fail to support his extravagant claims. See 59 Cong. Rec. 7173, 9407 (1920).

nor any other Executive official told Congress that the Secretary was without power to revoke a passport to protect the nation's security. In reality, administration spokesmen repeatedly informed Congress that the Department was "working under a regulation which says that whenever we believe it is in the national interest to deny or revoke a passport we have the authority to deny or revoke it." (*Proposed Travel Controls: Hearings on S. 3243 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 72 (1966)) and that this authority was "not in any way affected by the Supreme Court decision" in *Kent* (*Denial of Passports to Persons Knowingly Engaged in Activities Intended to Further the International Communist Movement: Hearings on H.R. 13760 Before the House Comm. on Foreign Affairs*, 85th Cong., 2d Sess. 7 (1958)). See also Pet. Br. 42-46; Pet. Reply Br. in response to the Br. in Opp. 5-6 & n.5. Similarly, respondent's description of the congressional debates following *Kent* is also incomplete and misleading.[8]

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[8] For example, in quoting Senator Eastland (Resp. Br. 80-81), respondent neglects to note that the then Chairman of the Senate Judiciary Committee not only criticized the decision in *Kent*, but also explicitly stated that "[t]he legislative history of the Passport Act * * * shows beyond question that it was the intention of the Congress at that time to give the Secretary of State authority to deny passports to those whose travel abroad would be contrary to the national security of this country." 104 Cong. Rec. 13336 (1958). Likewise, Senator Lausche, whose remarks are also cited by respondent (Resp. Br. 84), observed that even after *Kent* "[t]here would seem to be quite a broad area for the denial of passports which has not been tested in the courts." 107 Cong. Rec. 10327

3. Finally, respondent's procedural due process claim (Resp. Br. 116-125) is without merit.[9] At the outset, we submit that this issue, which was not addressed by the courts below, is not properly before the Court. The district court and court of appeals concluded that respondent is entitled to his passport and ordered the Secretary to restore that document. Upholding respondent's procedural contention would only provide respondent with a pre-revocation hearing and not his passport.[10] Hence, this claim is not an alternative ground supporting the judgment. In the absence of a cross-petition for a writ of certiorari on that issue, this Court would ordinarily not consider respondent's claim. See, *e.g.*, *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976).

In any event, the Department's regulations and the procedures used in this case fully satisfy respondent's right to procedural fairness. The Secretary personally made the determination to revoke respondent's passport and respondent was immediately informed of that decision (Pet. App. 120a-121a). This notice

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(1961). The other statements collected by respondent (Resp. Br. 81-83) are simply overly broad descriptions of the holding in *Kent* made by supporters of legislation designed to overrule *Kent*.

[9] We have previously addressed respondent's other insubstantial constitutional claims (Resp. Br. 102-116). See Pet. Br. 52-56.

[10] Respondent waived his right to an expedited post-revocation administrative hearing in Hamburg, West Germany. See Pet. App. 4a, 93a; 22 C.F.R. 51.80 *et seq.* Indeed, because respondent has conceded that his conduct falls within the terms of the regulation, even the denial of a post-revocation hearing would not have violated the Due Process Clause. See *Codd* v. *Velger*, 429 U.S. 624, 627 (1977).

further stated that respondent was entitled to a full administrative hearing and that the United States Consul in Hamburg was prepared to receive "on an expedited basis, any evidence you may wish to present on your behalf as to why your passport should be reinstated" (*id.* at 121a; see *id.* at 123a-124a; 22 C.F.R. 51.80 *et seq.*). In short, respondent had fair notice and an opportunity to be heard.

Respondent nonetheless argues that he was entitled to a pre-revocation hearing. This Court has repeatedly concluded, however, that ordinarily the summary deprivation of an interest protected by the Fifth Amendment does not violate the Due Process Clause, where, as here, an immediate post-deprivation procedure is available. See, *e.g.*, *Barry* v. *Barchi*, 443 U.S. 55, 63-65 (1979) (horse trainer's license); *Mackey* v. *Montrym*, 443 U.S. 1, 10-19 (1979) (driver's license); *Dixon* v. *Love*, 431 U.S. 105, 114 (1977) (driver's license); *Goss* v. *Lopez*, 419 U.S. 565, 582 (1975) (school suspension). To be sure, respondent has a substantial, although not fundamental, interest in his continued possession of a passport. See *Califano* v. *Aznavorian*, 439 U.S. 170, 176-177 (1978). But the government has a compelling interest in the protection of national security and our foreign relations, which unquestionably outweighs respondent's individual interests. See, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980). Indeed, requiring the Secretary to conduct a pre-revocation hearing would in many instances deprive the government of an opportunity to avoid serious damage to these interests before it occurs. Furthermore, the Secretary's personal determination of a revocation decision minimizes the chance of an erroneous deprivation, and the availability of an immediate post-revocation hear-

ing ensures that any unwarranted revocation of a passport will be short in duration. Accordingly, respondent was not deprived of procedural due process.

CONCLUSION

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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